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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JESS ALBERT GIGER, JR.,

Defendant and Appellant.

C070125

(Super. Ct. No. CM034927)

Defendant Jess Albert Giger, Jr., pled no contest to receiving stolen property (Pen. Code, § 496, subd. (a))¹ and resisting arrest (§ 148) and was sentenced to two years in county jail. He contends on appeal that the trial court abused its discretion in finding his was not an unusual case where the interests of justice would best be served by a grant of probation. Specifically, defendant argues the court did not give sufficient weight to a diagnosed mental condition that reduced his culpability.

¹ Undesignated statutory references are to the Penal Code.

We conclude the trial court appropriately exercised its discretion in sentencing defendant to county jail. We affirm the judgment.

BACKGROUND

On July 28, 2011, Butte County Sheriff's deputies found defendant in possession of a stolen phone. Defendant handed the phone over to the deputies without incident. Defendant was arrested. As a deputy attempted to put defendant into the patrol vehicle, defendant intentionally banged his head into the side of the vehicle. Struggling with the deputies, defendant said he was going to jail "in stitches" and intentionally banged his head into the vehicle's window. Ultimately, defendant was subdued and taken into custody.

Defendant was subsequently charged with receiving stolen property (§ 496, subd. (a)), felony vandalism (§ 594, subd. (a)), and resisting arrest (§ 148). It was further alleged that defendant served three prior prison terms. He pled no contest to receiving stolen property and resisting arrest. In exchange for his plea, the remaining charge was dismissed and the enhancement allegations stricken.

At sentencing, defendant argued for probation, indicating he was willing and able to comply with the terms and conditions of probation. The trial court was not persuaded. The court found defendant had a significant criminal history and was on parole when he committed the crimes for which he was convicted here. The court also expressed its concern for the public's safety if defendant were awarded probation because defendant,

who was previously diagnosed with "intermittent explosive disorder," failed to follow through with his treatment for that disorder.

Accordingly, the trial court sentenced defendant to the middle term of two years and ordered the term be served in county jail.² Defendant appeals.

DISCUSSION

Because defendant had more than one prior felony conviction, he was subject to section 1203, subdivision (e)(4), which rendered him presumptively ineligible for probation unless the trial court found this to be an "unusual" case where the interests of justice would be best served by granting probation. (§ 1203, subd. (e)(4).) "A denial of a grant of probation generally rests within the broad discretion of the trial court and should not and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner. [Citation.]" (*People v. Edwards* (1976) 18 Cal.3d 796, 807.) The same abuse of discretion standard applies to the review of the trial court's determination of whether a case is an unusual one permitting probation. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 (*Du*).) The "burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary."

² The trial court sentenced defendant to an additional one-year term on count 3, a misdemeanor, to be served "concurrently with any other time that is being served."

[Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 376; see also *Du, supra*, at p. 831.)

In a case like this one where the "defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would be best served,'" the trial court must first apply the criteria in rule 4.413(c)(1) and (c)(2) of the California Rules of Court³ to determine whether the statutory limitation on probation is overcome. (Rule 4.413(b); see also *Du, supra*, 5 Cal.App.4th at p. 830.) Rule 4.413(c) sets forth the facts that "may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate."

Rule 4.413(c)(1) sets forth "[f]acts relating to basis for limitation on probation" and they are: "(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and [¶] (B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense."

³ Undesignated rule references are to the California Rules of Court.

And rule 4.413(c)(2) refers to "[f]acts limiting defendant's culpability." The criteria under rule 4.413(c)(2) are whether: "(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence; [¶] (B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and [¶] (C) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

Rule 4.413(c) is to be read narrowly. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178.) Even if a fact listed in rule 4.413(c) exists, this does not necessarily show that the case is unusual; the trial court may find it so, but need not. (*Stuart*, at p. 178.)

Here, after hearing from counsel, the trial court concluded there was not a sufficient basis to overcome the presumption against probation under section 1203, subdivision (e)(4). The court noted defendant's "significant" criminal history, dating back to 1985, including defendant's dishonorable discharge from the California Youth Authority in 1996. Defendant also had five prior felony convictions, a prior parole violation, and he was on parole when he committed the crimes for which he was convicted here.

The trial court also discussed defendant's previously diagnosed mental disorder. The court expressed grave concern about defendant's unwillingness to manage the disorder as a term of his probation, and the resulting risk to public safety. This, the court observed, was a critical factor in refusing to grant defendant probation. The court did acknowledge that defendant's young age (defendant was 35) was a mitigating factor.

Thus, the trial court concluded, this was not an unusual case. Such a decision was neither arbitrary nor irrational. Accordingly, we find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

HULL, Acting P. J.

MAURO, J.